DESERT OUTDOOR ADVERTISING, INC.

IBLA 70-124 Decided June 14, 1971

Public Lands: Special Use Permits

When during the pendency of an appeal from the rejection of a special land-use permit application, a regulation is promulgated which prohibits the issuance of the desired permit, it is proper to deny the application.

Regulations: Applicability

Where a regulation is amended during the pendency of an appeal from the rejection of an application, and the amendment precludes the granting of that kind of an application whose allowance would otherwise be discretionary, the amended regulation governs.

2 IBLA 344

IBLA 70-124	:	Riverside 04-060-3
		:
DESERT OUTDOOR ADVERTISING, INC.	:	Special land-use permit renewal application rejected
		:
		Affirmed as modified

DECISION

Desert Outdoor Advertising, Inc., (hereinafter referred to as the appellant) has appealed to the Secretary of the Interior from a decision of January 27, 1970, in which the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Bureau's Riverside (California) district and land office, dated September 10, 1969, rejecting the appellant's application for the renewal of its expired special land-use permit for the maintenance of two advertising signboards. 1/

The signboards are located 100 feet southerly of the edge of Highway No. 111, which is a four lane divided expressway. The two signs are visible from the expressway. They advertise establishments which are located several miles easterly of the signs. The area where the signs are located is unimproved except for the signs and the expressway. The signs are in Riverside County, California, and on the NW 1/4 NE 1/4, SE 1/4 NE 1/4 sec. 30, T. 3 S., R. 4 E., S.B.M..

The Riverside office rejected the renewal application on two grounds which, in essence, were:

(1) Riverside County has a zoning ordinance which excludes outdoor advertising structures from the area in question.

1/ A permit was granted on May 15, 1964; it expired on May 14, 1969. On June 26, 1969, notice was issued to the appellant to remove the signs. Appellant did not remove the signs, but instead on July 16, 1969, filed the application in question.

(2) The pertinent regulation, 43 CFR 2236.2-1(c)(1) (redesignated 43 CFR 2921.2(a), 35 F.R. 9668 (June 13, 1970)), 2/ states that such a permit is not to be issued for lands within 660 feet of the Interstate System or primary system of highways until standards for such permits are promulgated by the Secretary of Transportation.

In its appeal to the Office of Appeals and Hearings, the appellant argued that the two grounds given for the rejection were "insufficient and incorrect" because:

(1) The zoning ordinance is invalid and unconstitutional. The appellant and others have brought separate legal actions in a State court to obtain injunctions to restrain the enforcement of said ordinance. The State court actions are pending.

(2) The regulation referred to by the Riverside office is not meant to apply to a renewal application for advertising displays validly in existence on September 1, 1965. The inapplicability of the regulation is shown by section 131(e) of the Highway Beautification Act of 1965 (as amended) 23 U.S.C. § 131(e) (Supp. V, 1969). 3/

2/ The text of the regulation is as follows:

"For lands within rights-of-way, and within 660 feet of the edge of the rights-of-way of the National System of Interstate and Defense Highways (Interstate System) and the primary system (title 23, United States Code), no permit for the erection and maintenance of advertising signs will be issued until national standards for such displays are promulgated by the Secretary of Transportation in accordance with the Beautification Act of 1965. When such standards are promulgated, permits may, in the discretion of the authorized officer, be issued, consistent with such standards and such additional standards as may be established by the Secretary of the Interior." The redesignated regulation has been superseded by 43 CFR 2921.0-6(a), 35 F.R. 18663 (December 9, 1970).

3/ Section 131(e) provides, in part:

"Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970." That date has passed; in any event, as indicated hereinafter, the signs are not located on either of those systems.

The Office of Appeals and Hearings, in affirming, rejected the appellant's contentions and indicated that the two grounds given for denying the application were valid. Also, it declared that the issuance of a permit is purely a discretionary matter.

The appellant, in its statement of reasons for the present appeal, filed on April 6, 1970, reiterates by reference the same two contentions it made below. The appellant also contends that the rejection of the application was an abuse of discretion.

The issues raised by the appellant's contentions largely have been rendered moot by changes made on December 9, 1970, in the pertinent regulations. The regulation, 43 CFR 2236.2-1(c)(1) (redesignated 43 CFR 2921.2(a), 35 F.R. 9668 (June 13, 1970)), which was a basis for the decision appealed from, has been superseded. The superseding regulation, 43 CFR 2921.0-6, 35 F.R. 18663 (December 9, 1970), now provides that no permits for advertising displays will be issued for lands within 660 feet of certain highways, or for advertising displays which would be visible from such highways. It also bars the issuance of permits for advertising displays located more than 50 feet away from the property being advertised. 4/

Information received from the Federal Highway Administration, Department of Transportation, shows that Highway No.

4/ The text of the regulation provides:

"(a) No permits will be issued for lands within rights-of-way within 660 feet of the edge of the rights-of-way of the National System of Interstate and Defense Highways (Interstate System) and the primary system (title 23, United States Code), or for displays which would be visible from such highways.

"(b) Permits for advertising displays on other areas will be issued only for displays advertising activities on or within 50 feet of the property where the display is located.

"(c) Natural beauty: Notwithstanding any other provision of this subpart, no permit will be issued for the erection and maintenance of any advertising display which would be inconsistent with national programs for the preservation of natural beauty."

111 is not a portion of the Interstate System or of the primary system. 5/ Therefore, the decisions below are predicated in part upon an incorrect assumption.

However, we have stated previously that the two signs in issue are located several miles from the establishments they advertise. It seems crystal clear that a permit, not based on a renewal application, could not be granted in light of the 50 feet provision of the amended regulation. The issue to be decided is whether the appellant has any legal "grandfather" rights entitling it to a renewal in the circumstances of this case.

Other pertinent regulations clearly show that this policy of prohibition applies to renewals as well as to new permits. Regulation 43 CFR 2921.4, 35 F.R. 18663 (December 9, 1970), states that:

> No permit for any advertising display shall be renewed unless the display meets the requirements of the regulations in this part.

Another regulation, 43 CFR 2920.3(c), 35 F.R. 9668 (June 13, 1970) (formerly 43 CFR 2236.1-3(c)), states that:

> Upon the expiration of a permit, if the permittee has complied with the provisions thereof, he will, upon the filing of an application for renewal, be the preferred applicant for a new permit, under regulations then in force, provided no superior claim to the land has been asserted in the meantime. Renewal, if granted, will be in the form of a new permit. (Emphasis supplied.)

5/ By letter of May 18, 1971, the Federal Highway Administration informed this office that:
"[T]he segment of highway in question is California Route 111 (Federal-aid Secondary Route No. 585), located in Riverside County, and traverse between a junction with Interstate Route 10 (approximately 6 miles east of Banning) and Palm Springs . . . . This highway is not an Interstate route nor a Federal-aid primary route."

The preferred right of application does not invest the appellant with a right to have his application granted. See Udall v. Tallman, 380 U.S. 1 (1964). He acquired a preference right as against third persons, but no vested right as against the United States. See Haley v. Seaton, 281 F.2d 620 (D.C. Cir., 1960). Therefore, it is proper to apply the regulations currently in force, since the allowance of the application is discretionary, apart from the prohibitions in the regulations. Moreover, the regulation just quoted explicitly makes renewal applications subject to current regulations. We therefore conclude that appellant has no right to have his application granted on the basis of a renewal.

Furthermore, on July 28, 1969, Assistant Secretary Loesch of this Department informed appellant's attorney that:

> . . . the Riverside office [of the Bureau of Land Management] is at liberty to take appropriate action on a renewal application within the ambit of applicable laws, regulations and Departmental policies. (Emphasis supplied.)

Regardless of whether the regulation of December 9, 1970, is deemed to control as a matter of law, it, nevertheless, clearly enunciates the Departmental policy of forbidding advertising displays located more than 50 feet away from the activity advertised.

Since the application in question is for a permit to maintain signs more than 50 feet away from the establishments advertised, the application falls within the stated prohibition; accordingly, it must stand as rejected. Since the decision below must be affirmed, as modified, on that basis, it would serve no useful purpose to consider further the contentions of the appellant, except to recognize that the denial of the permit, as now required by the regulations, is not an abuse of discretion.

In essence, the appellant's posture is that foreclosing the allowance of a certain type of application is arbitrary and capricious. The regulation, however, is reasonably related to the environmental ethic of the Department, and total preclusion of a certain type of application (whose allowance is discretionary) when designed to meet a public purpose, is proper. Cf. United States v. Wilbur, 283 U.S. 414 (1931).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed as modified.

Frederick Fishman, Member

We concur:

Francis E. Mayhue, Member

Newton Frishberg, Chairman.